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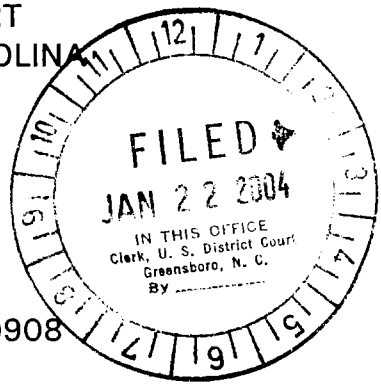
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



FOURTH QUARTER PROPERTIES IV, INC. and THOMAS ENTERPRISES, INC.	)	
Plaintiffs,	)	
v.	)	1:02CV00908
THE CITY OF CONCORD, NORTH CAROLINA; W. BRIAN HIATT; RICHARD K. LEWIS; JOHN W. CROSBY; and JOHN DOE DEFENDANTS 1 THROUGH 12	)	
Defendants.	)	

MEMORANDUM OPINION

TILLEY, Chief Judge

This matter is before the Court on Defendants' Motion to Dismiss and/or Stay Plaintiffs' Amended Complaint [Doc. #15]. For the reasons set forth below, the Defendants' Motion will be GRANTED IN PART.

I.

This action involves a dispute over the proposed construction of two buildings on property adjacent to the Concord Regional Airport ("the Airport"). The facts, in the light most favorable to the Plaintiffs, are as follows: Plaintiff Fourth Quarter Properties IV, Inc. ("Fourth Quarter") purchased approximately 43 acres of land south of the Airport in July of 1996, with the option to purchase an additional 1.71 acres. Fourth Quarter purchased the land with the intent to develop a

shopping center. Because Fourth Quarter is a single-asset investment company without employees, the land was to be developed and managed by Plaintiff Thomas Enterprises, Inc. ("Thomas").[1]

The land Fourth Quarter purchased was zoned to permit construction of the desired shopping center, but was subject to local and federal building restrictions due to the location of the tract and possible interference with flight operations. Specifically, on October 8, 1998, the City of Concord ("the City") enacted a zoning ordinance amendment which added a 50:1 height restriction on land south of the Airport.[2] In other words, a building can extend upwards one foot for every 50 feet it is from the end of the runway. On April 8, 1999, the City further amended the zoning ordinance to create a conditional use buffer zone around the Airport's southern runway. The amendment decreased the total building height allowed by requiring that an additional ten feet be subtracted from the height of any building in the buffer zone. Further, building any structure in the buffer zone would require the prior approval of a conditional use permit by the City Council. Part of Fourth Quarter's land fell within this buffer zone.

When Fourth Quarter attempted to exercise its option to purchase the additional 1.71 acres north of the original tract, it faced several obstacles. One major obstacle was that the City expressed intent to delay the land sale until

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[1]Fourth Quarter and Thomas are companies under common ownership.

[2]City of Concord Unified Development Ordinance, Section 4.13 et seq.

Fourth Quarter agreed to sign a reciprocal sewage easement agreement ("REA"), granting an easement across the original tract for the benefit of a nearby competitor shopping center.[3] The parties began negotiating the terms of such an agreement, along with the terms of a proposed Economic Incentive Agreement ("EIA") in which the City would agree to help the Plaintiffs develop the shopping center.

In connection with the REA and EIA negotiations, the Plaintiffs showed the City their plans for developing the two land parcels. The plans were attached as an exhibit to the EIA, and referenced in the agreement. Because the city zoning ordinance required a zoning clearance permit from the Airport's Aviation Director for construction in the area near the Airport, the Plaintiffs' plans were also sent to and reviewed by Aviation Director John Crosby. In fact, the City refused to sign the REA until Mr. Crosby had approved it. Under the city ordinance, a zoning permit "shall be granted" if the request meets all of the regulations set forth in the ordinance, including that the proposed use not create an Airport hazard. A party may apply for a discretionary variance if his permit is denied.

Mr. Crosby agreed to look at the proposed development before the Plaintiffs had drawn their final plans. The only problems Mr. Crosby noted with the proposal were that the Plaintiffs needed to relocate a multi-story hotel they had included in

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[3]The Complaint alleges that the City threatened to delay the sale and/or condemn the land if the Plaintiffs did not grant them an easement. (Compl. ¶ 66).

their plan, and that the Plaintiffs needed to change their proposed stormwater facility. The City signed the REA on February 11, 1999, after adding provisions addressing both of Mr. Crosby's concerns. Because of the minimal comments on the site plan, the Plaintiffs thought that shopping center construction had been approved and began preparing the land.

Mr. Crosby never designed a formal application form for a city zoning permit, but he informally told applicants to submit all required information for each proposed building on a separate federal form, FAA Form 7460-1. The requirements for a city zoning permit essentially mirrored the FAA requirements for construction approval, such that federal approval should ensure local approval. Site engineers for the Plaintiffs formally submitted FAA Form 7460-1 in October of 2000 in connection with the Plaintiffs' plan for a Toys 'R Us store.[4] These plans complied with the amended city zoning ordinance.

Along with the form for the Toys 'R Us store, the Plaintiffs included a site plan. The site plan included both the completed plans for the Toys 'R Us building and preliminary sketches for a Garden Ridge store. The Plaintiffs never submitted a separate formal Form 7460-1 for the Garden Ridge as required, but Mr. Crosby agreed to look at the Garden Ridge sketches for local zoning permit purposes so that the Plaintiffs could begin formal drawings and the bid process. On October 2,

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[4]The Plaintiffs also submitted a 7460-1 Form in June of 2000, but submitted a new form in October because of Mr. Crosby's concerns about the location of the Stormwater Facility on the June form.

2000, Mr. Crosby gave the plans a favorable review, and assured the Plaintiffs that a preliminary zoning permit would issue upon formal submission of the plans.[5] Accordingly, Thomas began the expensive process of having final construction plans drafted,[6] and told Garden Ridge that it would deliver the building for lease on September 3, 2001.

In the meantime, the City had informed the Federal Aviation Administration ("FAA") that it intended to change runway approaches for the Concord Airport in a way that would require a larger runway protection zone (RPZ). An RPZ is an area of restricted development near the runways, as established by federal law. The RPZ in effect at the time of Thomas' original plan submissions ended with the Airport's property, short of Fourth Quarter's property line. The proposed expansion would extend the RPZ into approximately eighteen acres of Fourth Quarter's property. Under current FAA policy, the Airport owner (here, the City) is the party responsible for acquiring and protecting the RPZ. If someone other than the Airport owner owns land in the RPZ, the building restrictions are only recommendations as to those owners.

In February of 2001, both the local FAA representative and the Airport's private consultant provided building recommendations to Mr. Crosby by separate letters. The FAA representative stated that the Plaintiffs' proposed construction

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[5]Mr. Crosby did tell Fourth Quarter to reduce the height of the storefront.

[6]The cost of the plans totaled $110,790.81.

would jeopardize an expanded RPZ, and suggested that construction be moved. The Airport consultant's letter also informed Mr. Crosby that, under an expanded RPZ, allowing the proposed shopping center construction would impair future runway options and Airport funding. The consultant twice reminded Mr. Crosby that, under FAA guidelines, the Airport owner is responsible for both acquiring and controlling the RPZ.

City Manager Brian Hiatt received the FAA representative's letter, but not the Airport Consultant's letter. Accordingly, Mr. Hiatt contacted the Plaintiffs on February 7, 2001 about the possibility of moving the Garden Ridge facility. On February 28, 2001, the parties worked out a proposal whereby Fourth Quarter would purchase more land from the City, partially paying for this land by exchanging some of their current property. Thomas drew up a Proposed Alternate Site Plan and told its attorney to draft new lease documents to reflect the change.

The parties agreed to meet to discuss the "land swap" proposal on March 28, 2001. However, in the meantime, the City had received a copy of the letter of recommendation from the Airport consultant and had second thoughts about the construction. At the meeting, Mr. Crosby told the Plaintiffs that the larger RPZ was already in place and that neither Toys 'R Us nor Garden Ridge could be built as proposed without violating federal law. Mr. Hiatt endorsed this statement and told the Plaintiffs that it would be futile to seek any other redress.

On April 17, 2001, in an attempt to salvage its Garden Ridge plans, the Plaintiffs submitted another site plan which would move the plan almost completely outside the future expanded RPZ, and which substantially decreased the size of the store. Thomas also hired its own FAA consultant and learned that the RPZ had not been expanded, and that its plans complied with current local and federal criteria. Thomas demanded an explanation for the "no build" policy, and the City responded with a fax of the October 8, 1998 zoning amendment. The City contends that this amendment implemented the new RPZ.[7]

On May 27, 2001, the Plaintiffs' zoning clearance permit was formally denied. Garden Ridge, an anchor store for the Plaintiffs' proposed shopping center, leased a building with a competitor shopping center nearby. As a result of Garden Ridge's departure, other stores such as Staples and Linens 'N Things abandoned their leases. The City eventually changed its position and approved the Toys 'R Us store plans on February 28, 2002, but emphasized that the expanded RPZ was still in place. The Toys 'R Us has since been built, and partially extends into the future expanded RPZ. Construction of a Red Lobster and an Olive Garden have also been allowed, despite the fact that they partially extend into the expanded RPZ. As of

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[7]The minutes from the hearing on the amendment state that the amendments to the zoning provisions were proposed "due to changing FAA regulations and procedures and to protect the future operations of the Concord Regional Airport." The amendments appear to include the 50:1 slope change and the addition of a "30 foot local buffer zone." Mr. Crosby indicated at the hearing that the changes should not affect single-story buildings.

the date of filing, Fourth Quarter still owned 12.55 acres of undeveloped land in the "no build" zone.

The Plaintiffs brought suit against the Defendants based on the delayed approval of the Toys 'R Us, and the refusal of the City to approve construction of the Garden Ridge. Plaintiffs have brought claims for breach of contract, inverse condemnation, unfair trade practices, negligent and/or willful misrepresentation, and tortious interference with actual and prospective leases.[8] Plaintiffs have also brought two claims under 42 U.S.C. § 1983, one for a taking in violation of the Fifth Amendment of the United States Constitution, and the other for violation of substantive due process. The Defendants filed a Motion to Dismiss the claims in part, and/or Stay the Complaint pending resolution of the state law claims.

II.

The Plaintiffs allege that the first way in which the Defendants violated 42 U.S.C. § 1983 was by taking property without just compensation in violation of the Fifth Amendment to the United States Constitution. Defendants filed a Motion to Dismiss this federal takings claim pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that this Court lacks subject matter jurisdiction over the claim because it is not ripe. For the reasons stated below, the Defendants' Motion to Dismiss the federal takings claim will be GRANTED.

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[8]In a footnote in their response to Defendants' Motion to Dismiss, Plaintiffs stated that they would voluntarily dismiss several of these claims. However, they have not yet done so.

A claim that governmental policies have unconstitutionally deprived a plaintiff of property rights is not ripe until two requirements are met. The first requirement is that the governmental entity in charge of implementing the regulations has made a final decision with respect to the property in question. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnston City, 473 U.S. 172, 186-87 (1985). The second requirement is that the property owner has been denied compensation for the alleged taking. In order to meet this second requirement, a plaintiff must "utilize procedures for obtaining compensation" prior to bringing a federal takings claim. Id. at 195 (finding that a § 1983 claim was not ripe where plaintiff failed to first bring state law inverse condemnation procedure); see also, Henry v. Jefferson County Planning Comm'n, 2002 WL 864267 *3 n.2 (4th Cir. May 7, 2002) (unpublished) (finding federal takings claim was not ripe despite the possibility of issue or claim preclusion by the time the claim ripened).

The Plaintiffs acknowledge that their federal takings claim is not ripe because they have not first attempted to obtain compensation from the state. However, they point out that they are pursuing their state law remedies by bringing their state law inverse condemnation claim in a diversity action before this Court. Because they are bringing the state claim simultaneously with their federal takings claim, they essentially argue that the federal takings claim will "ripen" as soon as this Court resolves the state law condemnation claim. However, the test for subject matter jurisdiction is whether a case is ripe for adjudication, not whether

the case may eventually ripen. For this reason, the Defendants' Motion to Dismiss the § 1983 takings claim for lack of subject matter jurisdiction will be GRANTED.

III.

In addition to the federal takings claims, Plaintiffs have brought numerous state law claims, including inverse condemnation, breach of contract, unfair and deceptive trade practices, negligent and willful misrepresentation, and tortious interference with prospective leases. Defendants request that this Court stay the Plaintiffs' state law claims and their federal substantive due process claim brought under 42 U.S.C. § 1983 because these claims are more properly heard in state court. In essence, the Defendants maintain that the abstention principles set out in Burford v. Sun Oil Co., 319 U.S. 315 (1943), as recently clarified by the Fourth Circuit, require this Court to decline jurisdiction over matters involving important matters of state law. For the reasons set forth below, the Defendants' Motion to Stay the Plaintiffs' remaining claims will be GRANTED.

A federal court should refrain from exercising its jurisdiction where necessary to show proper deference to a state's domestic policy. Burford, 319 U.S. at 317-18. For instance, federal courts should generally abstain from hearing a case where review "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Pomponio v. Fauquier Co. Bd. of Supervisors, 21 F.3d 1319, 1325 (4th Cir. 1994) (citing Colo. River Water Conservation Dist. v. U.S., 424 U.S. 800, 814 (1976)).

The Fourth Circuit has singled out local land use and zoning laws as quintessential matters of state concern, emphasizing that local zoning and land use law "is particularly the province of the State and that federal courts should be wary of intervening in that area." Id. at 1327. Abstention is inappropriate where there are also present "genuine and independent" federal claims, such as religious prejudice or statutory preemption. Id. at 1328. However, the Fourth Circuit has explicitly told federal courts to abstain in cases where "plaintiffs' federal claims stem solely from construction of state or local land use or zoning law, not involving the constitutional validity of the same and absent exceptional circumstances" such as independent federal claims. Id.

The Plaintiffs contend that their federal § 1983 due process claim is an independent federal claim which precludes Burford abstention. Their position is that the case involves a malicious denial of rights in violation of federal law, not a simple zoning dispute. Because the Fourth Circuit has said that a due process claim is properly stated where a basis for finding abuse of discretion in the denial of a building permit is alleged, Scott v. Greenville County, 716 F.2d 1409, 1419-20 (4th Cir. 1983), the Plaintiffs contend that they have an independent federal claim. Further, they contend that the unique posture of raising state and federal claims together distinguishes their case from current Fourth Circuit case law involving only federal claims.

This case is not one involving a genuine and independent federal claim. The remaining federal question in this case, whether the Plaintiffs have been denied substantive due process, is inextricably woven with the Plaintiffs' state law zoning dispute claims. This case involves a dispute over whether the Plaintiffs' proposed construction complied with a city zoning ordinance, and whether city officials abused their authority by wrongfully denying or delaying construction permits. The fact that this Court has diversity jurisdiction to hear the state law claims does not change the fact that the central dispute in this case involves the interpretation of local zoning laws and that this zoning dispute is better heard by the state court.

Having determined that abstention is appropriate, this Court must determine whether to stay or dismiss the Plaintiffs' claims. Where Burford abstention is appropriate, whether the district court should retain jurisdiction pending disposition of the matters in state court, or dismiss the case entirely, depends on the relief sought. If the case is brought in equity or relief is otherwise discretionary, the district court should dismiss the federal action. However, if the case involves damages claims, the district court should retain jurisdiction. Front Royal and Warren Co. Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998).

The Plaintiffs in this case primarily seek monetary damages, including punitive damages. Therefore, under current Fourth Circuit precedent, dismissal of

their remaining[9] claims is inappropriate. Instead, the claims should be stayed pending resolution of the zoning issues by the state courts. Accordingly, the Defendants' Motion to Stay the remaining claims will be GRANTED.

IV.

Finally, the Defendants have moved to dismiss Thomas as a plaintiff in this case. The Defendants characterize Thomas as "a separate legal entity" hired to perform services for Fourth Quarter, and state simply that Thomas neither owns the property at issue nor has independent rights which were violated by the Defendants. The Plaintiffs argue that because of the close business relationship between Fourth Quarter and Thomas, because all of the Defendants' dealings in this matter have been with representatives from Thomas, and because Thomas' reputation and finances have suffered because of the wrongs alleged, that Thomas is a proper plaintiff. Plaintiffs also note that, in the context of a motion to dismiss, they are entitled to have the allegations of the Complaint construed in the light most favorable to them.

While there are significant questions as to Thomas' standing to pursue its claims, the issue has not been sufficiently addressed by either party to warrant a decision at this time. Neither party has presented more than a paragraph or two addressing the issue of Thomas' standing, and neither party has presented any

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[9]Plaintiffs stated in their Response that they would dismiss all claims except the § 1983, inverse condemnation, misrepresentation, and individual-capacity unfair and deceptive trade practices claims.

authority to support its position. Given the relatively small amount of attention given to this matter by the parties, this Court would typically provide time for the parties to brief the issue. However, because this Court will stay the Plaintiffs' claims, the Defendants' Motion to Dismiss the claims against Thomas will be not be decided at this time.

V.

For the reasons stated above, the Defendants' Motion to Dismiss and/or Stay Plaintiffs' Amended Complaint will be GRANTED IN PART. The Defendants' Motion to Dismiss the takings claim brought under 42 U.S.C. § 1983 will be GRANTED. The Defendants' Motion to Stay the remaining claims pending resolution by the state courts will be GRANTED. The Defendants' Motion to Dismiss Thomas as a plaintiff will not be decided at this time. Specifically, this issue will be stayed pending resolution by the state courts.

This the 22 day of January, 2004.

United States District Judge